

ORIGINAL

FEDERAL MARITIME COMMISSION

OCEAN COMMON CARRIER STATUS OF
SHANGHAI HAI HUA SHIPPING Co., Ltd.
(HASCO) and SNL/HASCO CROSS
SPACE CHARTER AND SAILING
AGREEMENT, FMC AGREEMENT NO.
011807

Docket No. 02-09

Served: September 5, 2002

ORDER

This Order supplements the Summary Interim Order served on August 23, 2002, in which the Federal Maritime Commission ("Commission") addressed certain matters pending in this proceeding.

I. BACKGROUND

This proceeding was initiated by the Commission on June 26, 2002 pursuant to sections 4, 5, 6, 8, 10, 11, and 19 of the Shipping Act of 1984 ("Shipping Act"), 46 U.S.C. app. §§1703, 1704, 1705, 1707, 1709, 1710, and 1718. The Commission's Order of Investigation, Request for Additional Information, and Order to Show Cause ("Order") directed an investigation into whether Shanghai Hai Hua Shipping Co., Ltd. ("HASCO") is an ocean common carrier; whether the SNL/HASCO Cross Space Charter and Sailing Agreement, Agreement No. 011807 ("Agreement"), should be disapproved if it is found that HASCO is not an ocean common carrier; and whether the Agreement should be disapproved if it is found that the Agreement, as filed, does not meet the requirements of 46 C.F.R. § 535.103(g). In

2 OCEAN COMMON CARRIER STATUS - SHANGHAI HAI HUA

addition, the Order directed HASCO to show cause why its tariff (No. 017636-001) should not be cancelled; and why HXSCO should not be ordered to cease and desist doing business as a common carrier until such time as it provides proof to the Commission that it publishes and maintains a valid automated tariff as a non-vessel-operating common carrier (“NVOCC”) and maintains a bond and resident agent as required by section 19 of the Shipping Act and Commission regulations.

In the Order, the Commission noted that HASCO had previously reported, on Form FMC-1 filed in October 2001, that it would operate as a vessel-operating common carrier. However, the Commission noted that HASCO does not appear to operate any vessels in the trades for which it has published a tariff. Order at 2-3.

The Commission further noted that an Agreement between HASCO and Sinotrans Container Lines Co. Ltd. (“Sinolines” or “SNL”) was filed on May 29, 2002. Pursuant to that Agreement, the parties would share space on five vessels between U.S. Pacific ports and ports in Asia. Upon submitting the Agreement, filing counsel asserted that the Agreement would not be activated until HASCO established that it is a vessel-operating common carrier. Furthermore, the Information Form filed by the parties to the Agreement indicated that HASCO had made no port calls within the geographic scope of the Agreement in the past 12 months. Therefore, it appeared that HASCO had not operated any vessels in U.S. foreign trades, either under the terms of the Agreement or any other existing vessel charters.

Consequently, pursuant to section 6(d) of the Shipping Act, the Commission requested additional information from HASCO and SNL to determine whether HASCO qualifies as an

ocean common carrier and whether the Agreement may become effective. Id.

II. POSITIONS OF THE PARTIES

A. HASCO's Response to the Request for Additional Information

On July 10, 2002, HASCO filed a Confidential Response to the Request for Additional Information ("HASCO Response to Addiuonal Information"). In this Response, HXSCO argues that the Request is not authorized under section 6(d) of the Shipping Act, and further argues that the only proper determinations to be made under section 6 are pursuant to section 6(g), which provides, in pertinent part, that the Commission may seek appropriate injunctive relief if it determines that an agreement is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. HASCO contends that the Agreement does not reduce transportauon service, rather it adds transportation service. HASCO further contends that once notice of an agreement is sent to the Federal Register, the Commission's authority to reject the agreement has been waived.

HASCO also asserts that requests for additional information are statutorily required to be kept confidential, and that the Commission's Bureau of Enforcement ("BOE"), a party to the proceeding, is privy to otherwise confidential information. HASCO further asserts that counsel was notified on February 13, 2002, by the Commission's Secretary, in connection with another agreement (&n/Great Western Agreement, No. 011786) that the Commission intends to review the use of vessel time charters in establishing ocean common carrier status via a rulemaking, and, therefore, it is unreasonable for the Commission to address the

4 OCEAN COMMON CARRIER STATUS - SHANGHAI HAI HUA

issue of HXSCO's ocean common carrier status through the instant proceeding. HASCO avers that the Commission has made a major policy change in applying or proposing criteria regarding ocean common carrier status and that this criteria should properly be developed during the course of a rulemaking proceeding.

HASCO also requests that the Commission shorten the review period provided upon the filing of additional information under section 6(c)(2), arguing that the delay in the effective date unfairly prevents HASCO from operating its time chartered vessel, denying it access to the transpacific market during the peak season. HASCO's Response at 11.

B. BOE's Response to HXSCO's Motion for Expedited Approval

BOE filed a pleading denominated "Response to HASCO's Motion for Expedited Approval" characterizing the request for expedited approval contained in HASCO's Response to Additional Information as a "motion." BOE asserts that HASCO's Motion for Expedited Approval should be denied because HASCO has failed to demonstrate "exceptional circumstances," by providing a description of specific facts or circumstances that would warrant expedited approval, as required by Commission rules at 46 C.F.R. §535.605. BOE further asserts that HASCO and Sinolines have inadequately responded to the Request for Additional Information. BOE's Response to HASCO's Motion for Expedited Approval at 4-5.

C. HXSCO's Motion to Strike BOE's Response to Motion for Expedited Approval

HASCO argues that its request for expedited approval is not a motion and should not be treated as one. HASCO also

argues that BOE should be precluded from filing a response, as its request was not a motion, and, therefore, BOE's Response to the Motion for Expedited Approval should be stricken from the record. With respect to BOE's argument regarding HASCO's failure to demonstrate specific circumstances that warrant expedited treatment, HASCO avers that, inter alia, it is unfairly being prohibited from operating its time chartered vessel while other time charterers in the U.S. foreign commerce have been able to operate without delay; and it has been denied the opportunity to operate during the transpacific market's peak season.

D. BOE's Response to HASCO's Motion to Strike

BOE asserts that HASCO does not dispute that it made a request for expedited approval in its Response to Additional Information. BOE contends that the request must be considered within the context of the docketed proceeding initiated by the Commission and that HASCO's Motion to Strike should be denied for failing to demonstrate a substantive basis for striking BOE's pleading. BOE further contends that HASCO's suggestion that only the Bureau of Trade Analysis ("BTA") be permitted to communicate with HASCO is "fundamentally incompatible" with the Commission's obligations under due process and the regulations that govern a formal proceeding. BOE's Response to Motion to Strike at 3. BOE contends that it has sought to comply with Commission regulations that specify additional steps requiring notice and service upon HASCO. Id.

E. SNL's Petition for Confidentiality

On August 8, 2002, SNL filed a Petition for an Order of Confidentiality ("Confidentiality Petition") to protect its time charters and related documents. SNL identifies six time charters, drafts of these time charters, a fixture note and four e-mails

negotiating the terms of the charters that it has submitted in connection with its Agreement or in this proceeding. SNL identifies eight elements of these documents (“the Disclosable Items”) of interest to BOE, which it recognizes as a legitimate need, and requests that all other elements of these documents not be publicly introduced into the record by BOE. SNL does not request confidentiality for other documents or information it has submitted. Confidentiality Petition at 2-4. SNL contends that confidentiality is required because the documents identified are “inherently proprietary and confidential,” and that SNL would suffer “competitive harm and embarrassment” should these documents be released. SNL notes that it has submitted its Petition notwithstanding its view that information submitted in connection with a filed agreement is accorded confidentiality by 46 C.F.R. §535.608, and that the determination of whether such information is relevant to, and therefore disclosable in, a Commission proceeding is to be made by the Commission, not BOE. Id.

F. BOE’s Response to SNL’s Petition

On August 9, 2002, BOE filed its Response to SNL’s Petition for Order of Confidentiality (“Confidentiality Petition Response”) supporting SNL’s Confidentiality Petition. BOE posits that Rule 201(i) of the Commission’s Rules of Practice and Procedure, 46 C.F.R. §502.201(i), provides the standard and procedures to allow the Commission to identify and protect confidential business matter arising within the context of a Commission proceeding. Confidentiality Petition Response at 2. BOE asserts that the Respondents are in the best position to determine which information is confidential, and accordingly can best identify such business material and make any necessary arguments for any continued confidentiality. BOE further asserts that it supports SNL’s Confidentiality Petition, as it “strick[es] an

appropriate balance between SNL's commercial requirements and the needs of the public and the shipping industry to have access to the Commission's docket records[.]” and therefore, requests that the Commission grant SNL's petition in substantially the same form that SNL has requested. Id. at 3.

G. BOE's Petition for Injunctive Relief

BOE petitions the Commission to initiate suit for the purpose of enjoining the effectiveness of the Agreement under section 11 (h) of the Shipping Act in aid of the Commission's investigation in this proceeding.¹ BOE further suggests that injunctive action be sought pursuant to section 6(i) because, BOE alleges, the filing parties have not substantially responded to the Request.³

¹BOE filed its Petition for Injunctive Relief as a confidential pleading, based on its inclusion of material from HASCO's Confidential Response to Additional Information, along with a public version, in accordance with Commission Rule 119.

²Section 11(h) provides, inter alia, “in connection with any investigation conducted under this section, the Commission may bring suit in a district court of the United States to enjoin conduct in violation of this Act. Upon a showing that standards for granting injunctive relief by courts of equity are met. . . the court may grant a temporary restraining order or preliminary injunction.”

³Section 6(i) provides, inter alia, that “if a person filing an agreement...fails substantially to comply with a request for the submission of additional information or documentary material within the period specified in subsection (c), the United States District Court for the District of Columbia, at the request of the Commission -

(1) may order compliance;

BOE notes that, like HASCO, it perceives substantive distinctions between the decision of the Commission to permit an agreement to become effective upon the expiration of the review period provided by statute and the decision of the parties as to the date upon which they may choose to implement the Agreement. Among the significant consequences of a Commission decision to permit an agreement to become effective that BOE identifies are the attachment and continuation in force of antitrust immunity under section 7 of the Shipping Act. BOE argues that allowing the agreement to become effective by operation of the statute, without challenge, will be seen as placing the Commission's imprimatur on the Agreement and would have the effect of prejudicing consideration of the issues in this proceeding.

BOE notes, as the Commission did in its Order, that filing counsel for the Agreement, who is counsel for SNL, stated that the Agreement will not be implemented until the issue of HASCO's status as an ocean common carrier is resolved by the Commission. Nevertheless, BOE contends that these assurances are "entirely voluntary" and inadequate to prevent effectiveness of the Agreement under sections 6 and 7. Therefore, BOE urges the Commission to seek an injunction.

BOE further contends that injunctive action should be undertaken because the filing parties have not substantially responded to numerous items specified in the Request. BOE identifies particular items to which it considers the responses incomplete with respect to each of the Respondents. BOE complains that these questions have not been "substantially

(2) shall extend the period specified in subsection (c)(2) until there has been substantial compliance; and

(3) may grant such equitable relief as the court in its discretion determines necessary or appropriate."

answered” in the first instance because the answers have been misdirected (i.e., they challenge the premise of the Commission’s question rather than supplying the informatton sought) or, in the case of the issue of the completeness of the Agreement as filed, rely solely on the subsequently-filed amendment. BOE notes that both parties asserted the attorney-client privilege for documents responsive to the remaining questions it identified, but takes issue only with the breadth of HASCO’s assertion of the privilege as covering all “communications to/from or between attorneys for the parties.” BOE argues that the privilege does not attach to communications between attorneys for different parties or to communications by an attorney for a party and any person or company not represented by that attorney. BOE Petition at 8. BOE further notes that, with respect to the questions seeking informauon on HASCO’s responsibility for specific aspects of the vessel’s operations, HASCO answers only with regard to the typical division of responsibility between an owner and a charterer, not with respect to its own arrangements with SNL under this Agreement or its sub-charter.

H. HASCO’s Response to Petition for Injunctive Relief

HASCO’s Response to BOE’s Request for Injunctive Relief (“HASCO Response”) avers that its Agreement involves the shared operation of five vessels whose total capacity is less than one per cent of “the world’s largest trade,” and would not violate the antitrust laws. HXSCO points out that the Commission may secure an injunction under section 11 (h) only if the standards for granting injunctive relief by courts of equity have been met. Those standards, HXSCO notes, as set forth in Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977) and Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n, 259 F.2d 921 (D.C. Cir.

1958), include the showing that irreparable injury will occur if the injunction is not granted. The additional standards are that the party seeking the injunction is likely to prevail on the merits; that the threatened irreparable injury outweighs any harm to the defendants; and that an injunction will serve the public interest. HASCO notes that BOE did not address these standards in its Petition and argues that the Commission cannot meet any of the standards.

With respect to BOE's allegations that Respondents have not substantially responded to the Request, HASCO argues that by submission of the Substitute Original Page, the complete Agreement has been filed, and thus this question (no. 12) has been fully answered. With respect to the assertion of attorney client privilege, HASCO alleges that correspondence between counsel for HXSCO and counsel for SNL about "matters that are the subject [of] the proceeding" would be privileged because HASCO and SNL are co-respondents in this proceeding, under a joint defense privilege, which in turn extends to a "common legal interest rule."

HASCO also contends that authority to address the Agreement parties, or advise the Commission of any concerns as to the completeness of the parties' responses, lies with the Bureau of Trade Analysis, not BOE, under the Commission's regulations. BTA has raised no such concerns, and any recommendation from BTA would now be tainted by "BOE's ex parte communications." HASCO Response at 5. The ex parte communications are said to be BOE's stated review of the carrier responses in conjunction with the staff of BTA, referenced in BOE's Petition at 6. HASCO points out that the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(d), prohibits employees engaged in investigative or prosecuting functions from participating or advising in a decision, recommended decision or

agency review in a proceeding under section 557 (adjudication). HASCO alleges that BOE's consultations with BTA are not consistent with the separation of functions required by the APA.

Finally, HASCO charges that BOE has improperly used confidential information contained in its response to the Request. BOE's use of confidential filing procedures for its Petition is insufficient to fulfill the Commission's obligation of confidential treatment, HASCO contends, because the Commission's regulations do not allow the use by BOE of section 6(d) responses for any purpose. Therefore, BOE "had no legal right to use such materials," HASCO argues, and such regulations may not be changed by an Order of Investigation.

I. SNL's Response to the Petition

SNL replies that an injunction is unnecessary because the Agreement will not be implemented, citing its statement in its July 26, 2002 Response to the Order to Show Cause that "Sinolines will not implement Agreement No. 011807 until there is a decision by the Commission in this Docket about the VOCC status of HASCO. . . ." SNL Response to Petition for Injunctive Relief ("SNL Response") at 1.

III. DISCUSSION

A. HASCO's Request for Expedited Approval

In its Response to Additional Information, HASCO requests that the Commission shorten the review period for the Agreement based on its contention that the Commission lacks the authority to conduct this proceeding. Thus, HASCO contends that the Request was unlawful under section 6(d) and its legislative history and that the Request unfairly prevents use of HASCO's

time chartered vessel as well as denying it access to the transpacific market during the peak season. HASCO's Response to Request at 10-11.

HASCO's request for expedited approval is directly contrary to the purpose of this proceeding. It was instituted to determine whether the Agreement may become effective pursuant to section 6 or pursuant to section 4 of the Shipping Act, which requires that agreements be "by or among" two ocean common carriers. The instant proceeding's purpose is to determine whether HASCO is actually an ocean common carrier, qualified to enter into such an agreement with Sinolines. It was appropriate to seek additional information to address this issue in connection with the filing of its Agreement, as authorized by section 6(d). Use of the Commission's power to accelerate the effective date of the Agreement would be fundamentally inconsistent with the actions it has taken and the significant concerns it has raised to date. As expedited treatment is inconsistent with the purpose of the proceeding, we will deny HASCO's request for expedited treatment.

⁴HASCO also argues that the Commission's rules inappropriately refer to expedited approval because the Commission lacks the power to approve agreements. Hasco's Motion to Strike BOE's Response to Motion for Expedited Approval at 1, note 1. HASCO's argument is unpersuasive. Although the Commission as a general rule does not approve agreements, the nature of the action it is authorized to take under section 6(e) is statutorily entitled "Expedited Approval" and is, in fact, a positive act that permits an agreement to become effective in less than the statutorily mandated period the parties must wait before carrying out their agreement.

B. HASCO's Motion to Strike BOE's Response to Motion for Expedited Approval

HASCO attacks BOE's response in the first instance on the basis that HASCO has not filed any motion in this proceeding. Rule 72, 46 C.F.R. §502.72, provides that in a proceeding, any request for a determination or action is to be made by "motion" if the proceeding is before an administrative law judge or by "petition" if the proceeding is before the Commission. Although BOE might more accurately have characterized HASCO's request for Commission approval of an earlier effective date for its agreement as a "petition," BOE correctly asserted its right as a party to respond to that pleading within 15 days pursuant to Rule 74(a)(2), 46 C.F.R. §502.74(a)(2). We will not, therefore, strike BOE's "motion" simply because it was denominated as such.

1. HASCO's Procedural Arguments

HASCO's Motion To Strike also incorporates several procedural arguments previously made in its Response to Additional Information, including that the Commission's review of agreements can be accomplished only through the procedures set forth in Part 535 of its rules, 46 C.F.R. Part 535, separate from any other powers the Commission may have under the Shipping Act. Thus, HASCO argues, the Commission is precluded by the structure of the Shipping Act and its own regulations from applying its authority and procedures to investigate violations of the Shipping Act to the review of agreements before they become effective, and is precluded from making BOE privy to information filed confidentially in connection with the filing of an agreement. In addition, HASCO insists that the Commission will act without binding precedent as authority for any ruling on vessel operating common carrier status that may emerge from this

proceeding and in conflict with its treatment of other agreements permitted to become effective under the Shipping Act. None of these arguments is persuasive.

HASCO's suggestions that the Commission's inquiry in this case results in procedural and substantive unfairness to it are unwarranted. Rather than allow an agreement of questionable status to become effective without challenge, the Commission has sought to address on a timely basis the jurisdictional issue of whether the whole of the relationship between the parties to the space chartering Agreement and the time charter results in such significant limitations on the charterer's (HASCO's) use of the vessel as to make its designation as "operator" of the vessel inaccurate. Since operation of this vessel appears to be the sole basis for HASCO's claim to be a VOCC, the Agreement would not be "among ocean common carriers."

The Commission's procedure in this case was instituted in order to give HASCO an opportunity to address these concerns. It gives HASCO that opportunity and procedural rights which would not have been available had the Commission simply rejected the Agreement.⁵ Moreover, contrary to HASCO's contention, nothing in the structure of the Shipping Act precludes the Commission from addressing the issue of whether an agreement is between two qualifying parties, which is a jurisdictional inquiry, in an adjudicatory proceeding rather than by summary action to reject the agreement. It would be an anomalous interpretation of the statute to conclude that it requires

⁵The proceeding was instituted, in part, so that, if the Agreement became effective by force of law under the statutory time limits on review, the Commission could continue to consider whether it should be disapproved or cancelled for failure to qualify as an agreement subject to the Shipping Act, under sections 4, 5, and 11.

making such a substantive decision in a procedurally truncated fashion lacking all opportunity for the Agreement parties to address the issue or for the Commission to obtain the information necessary to reach an informed opinion.⁶

Even assuming, arguendo, that HASCO is correct in asserting that Commission precedent supports its claim that it is an ocean common carrier, it is incorrect in arguing that the

⁶HASCO's argument that the Commission is without power to reject an agreement after it has sent a notice of the filing of the Agreement to the Federal Register is equally without merit. Nothing in the text of section 6 supports HASCO's contention: section 6(a) (notice of its filing be transmitted to the Federal Register within 7 days) is not referenced in section 6(b) (power to reject an agreement) or in section 6(c). Section 6(b) provides for rejection of an agreement that the Commission finds not to be in accordance with the filing requirements of section 5. These requirements include the jurisdictional requirements that an agreement be between qualified parties and concern an activity described in section 4.

Under section 6(b), the Commission must reject an agreement within the later of 45 days after the agreement's filing or 30 days after notice of the filing is published in the Federal Register. If the Commission requests additional information, this period will be extended for an additional 45 days after receipt of all requested information.

Although agreements become effective if not rejected by the Commission within the time limits of section 6(c), the question of whether an agreement may be appropriately filed and effective under the Shipping Act may be raised at any time. Moreover, although the Commission's section 6(b) "rejection" authority is coextensive with the maximum review period (see Shipping Act of 1983, H.R. Rep. No. 98-53 (1983)), nothing in section 6(b) suggests that the Commission cannot take action against an effective agreement at any time that the jurisdictional requirements of sections 4 and 5 are not met.

Commission lacks the power to examine that issue in this proceeding. The Commission's interpretation of the statute may evolve to address changing industry practices and forms of cooperation so long as the Commission acts through an appropriate process and sufficiently explains its reasons: See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 543-44 (1978) ("Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'") Nor is the Commission precluded from addressing the issue in an adjudicatory proceeding rather than a rulemaking: the determination of whether to proceed by rulemaking or adjudication to determine issues within the agency's purview lies solely within the agency's discretion. See Securities and Exchange Commission v. Chenery, 332 U.S. 194,202 (1947) ("[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the agency.")

HASCO argues that the Commission is authorized to seek additional information pursuant to section 6(d) only in connection with a determination to be made under section 6(g). In the HASCO Response to Additional Information, HXSCO relies on language expressing the expectation of the conferees on the bill which became the Shipping Act of 1984 that "'only in cases in which there is a substantial issue of unreasonable and anticompetitive effects will the Commission need to make use of this authority.'" See HASCO's Response at 16 (citing S. Rep. No. 47 at 30-31 (1984)). Despite the expressed expectations of the conferees, nothing in the structure of the Shipping Act or the remainder of the legislative history suggests that the authority granted in section 6(d) may only be used to address the concerns

raised in section 6(g). Section 6(d) refers to the “determinations required by this section.” “Determinations” is plural and may most reasonably be read to include any determination necessary under the review standard set forth in section 6(b) “Review Standard,” as well as the determinations required under section 6(g) dealing with “Substantially Anticompetitive Agreements.” HASCO’s reading would require the Commission to interpret the word “section” to read “subsection 6(g)” rather than give it its normal meaning which would include all of section 6.

HASCO also contends that the proceeding is fatally flawed because “responses to a Request for Additional Information are required to be kept confidential by statute” and that this requirement of confidentiality is breached by virtue of the Commission’s Order making BOE a party to the proceeding who must be served with this information. The degree of confidentiality for information submitted in connection with filed agreements provided by the Shipping Act is vastly overstated and its purpose distorted by HASCO.

Section 6(j) provides that such information is “exempt from disclosure under [the Freedom of Information Act (“FOIA”)] and may not be made public except as relevant to an administrative or judicial action or proceeding.” 46 U.S.C. app. § 1705(j). (Emphasis added). This provision of confidentiality is limited to denial of the information to members of the public, not to the Commission or members of its staff. The participation of BOE in this proceeding does not involve the production of information pursuant to FOIA. The Order instituting this proceeding, which provided for confidential transmission of the Request to counsel and ordered response by the Agreement parties, reflects the Commission’s determination that the requested information is relevant to this administrative proceeding. In any event, HXSCO could have requested

confidential treatment for information it deems necessary to protect from public disclosure within the proceeding via a protective order, as SNL has done.⁷ It has not done so.

HASCO further suggests that the availability of this information to BOE is inconsistent with the Commission's order making discovery unavailable in this proceeding. The request for additional information regarding an agreement filed for Commission review is authorized by section 6 of the Shipping Act. Nothing in section 6 precludes its use in a proceeding; to the contrary, section 6, as noted above, specifically contemplates such use. Nor does anything in section 6 suggest that the request for additional information is "discovery." It is not. Only the Commission may issue such a request; it is not available to parties to proceedings as other forms of information production are when so ordered.

HASCO also asserts that "it is unreasonable and objectionable for the Commission to raise concern about HASCO's time charter" because the Commission has publicly announced that it will conduct a rulemaking proceeding to examine the issues raised in this case. HASCO is incorrect. The Commission has not 'publicly announced' any such initiative.'

'To date, nothing in BOE's use of this information has been inconsistent with its protection from public disclosure.

⁸ The Commission's Secretary did inform counsel for a filed agreement (to which HASCO was not a party) that the Commission might well have reason to re-examine the VOCC status of one of the parties to that agreement, and therefore the agreement's lawfulness, as a result of a rulemaking proceeding the Commission contemplates on the use of vessel time charters in establishing ocean common carrier status.

Neither a Commission decision to undertake a prospective rulemaking with respect to a general issue or the Commission's decision not to institute proceedings with respect to one agreement precludes it from carrying out its obligation to assure itself that a filed agreement conforms to the standards of the Shipping Act. The Commission is obligated to ensure that parties whose activities will be immunized from the antitrust laws are persons eligible to enter into such an agreement. The Commission's action on review of one agreement does not constitute binding precedent for its review of other agreements. A decision not to seek injunctive action under section 6(g) or otherwise investigate an agreement is not an adjudication by the Commission which might serve as precedent.

2. HASCO's Arguments of Unfair Prohibition
from Operation

HASCO argues that it is being unfairly prohibited from operating its time chartered vessel, while other vessel time charterers have been able to operate in the U.S. foreign trades without any delay. Contrary to HASCO's assertion, it is not being "prohibited" from operating any vessel. Rather, HASCO is only unable to operate the vessel it proposes to time charter pursuant to the Agreement, pending the Commission's review of HASCO's Response to Additional Information and the Commission's determination as to whether HASCO is an ocean common carrier. HASCO itself acknowledges that its reasons for not putting a vessel into operation are economic, not legal. "HASCO would have no economic reason to time charter the vessel since a one vessel service in the Trade would not make sense economically or commercially." HASCO Response to Additional Information at 11. Therefore, HASCO's argument that it has been unable to operate during the transpacific market's peak season is also without merit. Inasmuch as HASCO is free to operate any vessel

20 OCEAN COMMON CARRIER STATUS - SHANGHAI HAI HUA

it may actually time charter or otherwise acquire, these arguments are irrelevant and misleading.

HASCO's argument that it will become an ocean common carrier when its Agreement becomes effective is conclusory, as the purpose of this proceeding is to determine whether HXSCO is in fact an ocean common carrier, and thus eligible to enter into an agreement with Sinolines.

Based on the foregoing, HASCO's Motion to Strike is denied by the Commission.

C. SNL's Petition for Confidentiality

SNL's request that certain documents containing confidential business information be shielded from public disclosure in this proceeding except for the "Disclosable Items" it has identified appears to be reasonable. It is supported by BOE. Therefore, SNL's Confidentiality Petition is granted."

⁹ SNL requests confidentiality for six time charters (five to Smohnes from various owners and one from Sinolines to HASCO[submitted to BTA by HASCO]), a draft of these charters, an April 29, 2002 fixture note for these charters, and four (April 29, May 17, May 20, and May 22, 2002) e-mail, except for the following "Disclosable Items" in the time charters of the TRADE BRAVERY (a) from MS Widukind Reederei Tamke GmbH & Co. to Smohnes (Master Charter) and (b) from Smohnes to HASCO (the HASCO Charter): (1) the trade range (lines 32 and 33 and Rider Clause 86 in both Charters), (2) redelivery range and time (lines 54 and 55 in both Charters), (3) cargo lien (lines 110 to 113 and Rider Clause 104 in both Charters), (4) P&I cover (Rider Clause 34 in both Charters), (5) the facsimile number of charterer (Rider Clause 41 in both Charters), (6) vessel renaming (Rider Clause 47 in both Charters), (7) owner's right to change the flag (Addendum I(A) to both Charters) and (8)

D. BOE's Petition for Injunctive Relief

The Commission could seek to enjoin conduct under an agreement that would be in violation of the Shipping Act at any time after it has become effective pursuant to section 1 l(h). However, in light of SNL's commitment not to implement the Agreement prior to a Commission determination of the issues herein, such an action pursuant to section 11(h) would appear to be unnecessary as a means of preserving the Commission's ability to decide and act upon the issue. We see no reason for the Commission or the parties to undertake the expense and burden of litigation for the purpose of preventing an appearance of Commission concurrence in the status claimed by HASCO: the Order instituting this proceeding is sufficient for that purpose.

Moreover, Respondents have supplemented or otherwise modified their responses to the Request in certain instances in response to BOE's Petition. Some differences remain between the parties as to the degree to which all documents responsive to the Request, which are not subject to a proper assertion of attorney client privilege, have been provided. HASCO's claim of attorney/client privilege appears to be overbroad, encompassing communications between counsel for different parties and between the attorney for HASCO and persons or companies not represented by that attorney. Nevertheless, we see no reason that those issues may not be addressed in the present proceeding rather than in the U.S. District Court for the District of Columbia.

The Order provided that the discovery procedures usually available in Commission proceedings would not be available in

termination of the charter based on the FMC case (Addendum 2 to the HASCO Charter).

this case, in the belief that all information relevant to HASCO's status as an ocean common carrier would be made available in response to the Request, and in an effort to secure a timely resolution to the issues. However, in view of BOE's contention that relevant documents may not have been identified and produced under this broad claim of immunity, we will resolve the matter by ordering HASCO to identify all documents or correspondence responsive to the Commission's Request which have not been produced, and the basis upon which it claims that such documents or correspondence are privileged from production, through preparation of a Vaughn Index." We will further provide an opportunity for BOE to contest the claim of privilege, and file such additional pleadings as it deems appropriate on the basis of any additional documents or correspondence we order to be produced.

Accordingly, BOE's Petition for Injunctive Relief will be denied.

THEREFORE, IT IS ORDERED, That HASCO's request for expedited approval of the Agreement is denied;

¹⁰Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).x requires a party asserting privilege as to documents whose production is required to make the claim expressly, and describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

IT IS FURTHER ORDERED, That HASCO's Motion to Strike BOE's Response to HASCO's Motion for Expedited Approval is denied;

IT IS FURTHER ORDERED, That SNL's Petition for Confidentiality is granted;


IT IS FURTHER ORDERED, That BOE's Petition for Injunctive Relief is denied;

IT IS FURTHER ORDERED, That HASCO provide a Vaughn Index of any documents it has not produced in response to the Commission's Request for Additional Information for which it asserts attorney client privilege within 15 days from the date of this Order;

IT IS FURTHER ORDERED, That BOE may contest the claim of privilege, and seek production of any document identified in the Vaughn Index, within 7 days of receiving the Vaughn Index; and

FINALLY, IT IS ORDERED, That BOE may file within 15 days of their production such supplemental pleadings as it finds necessary in light of the production of any additional documents or correspondence.

By the Commission.


Bryant L. VanBrakle
Secretary